

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE NEW YORK TIMES COMPANY and	:	
MARK WALKER,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	<u>COMPLAINT</u>
UNITED STATES DEPARTMENT OF HEALTH	:	
AND HUMAN SERVICES,	:	
	:	
Defendant.	:	
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Plaintiffs THE NEW YORK TIMES COMPANY and MARK WALKER, by and through its undersigned attorneys, allege as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”), to obtain an order for the production of agency records from the United States Department of Health and Human Services (“HHS”) in response to a request properly made by Plaintiffs (jointly, “The Times”).

PARTIES

2. Plaintiff The New York Times Company publishes *The New York Times* newspaper and www.nytimes.com. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, New York, 10018.

3. Plaintiff Mark Walker is a reporter for *The New York Times* newspaper.

4. Defendant HHS, the federal agency in charge of providing health care services to all Americans, has possession and control of the records that Plaintiffs seek.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is premised on Plaintiffs' place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

7. FOIA requires that agencies respond to FOIA requests within 20 business days. *See* 5 U.S.C. § 552(a)(6)(A).

8. Defendant HHS has failed to meet the statutory deadlines set by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)–(B). Plaintiffs are therefore deemed to have exhausted all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

FACTS

9. The Indian Health Services (“IHS”) is the agency within HHS that is “responsible for providing federal health services to American Indians and Alaska Natives.” *About IHS*, Indian Health Servs, <https://www.ihs.gov/aboutihs>. IHS provides direct care to patients at IHS and tribal health care facilities.

10. The Purchased/Referred Care (“PRC”) Program is a congressionally funded program whereby IHS pays for health care services that are not available through direct care and are, instead, obtained from private health care providers. *See* 42 C.F.R. § 136.22.

11. The PRC Program is not an entitlement program. PRC-eligible individuals are required to apply for the program. *See id.* §§ 136.22–23. When funds are insufficient, “priorities for service [are] determined on the basis of relative medical need.” *Id.* § 136.23(e).

12. On January 22, 2020, Mr. Walker submitted a FOIA Request (“the Request”) to IHS, seeking “[t]he database or records used to track ‘persons to whom PRC will be provided’

(2-3.5). The request should include but not be limited to a break down of the referred services, the determination of whether an IHS facility is ‘reasonably accessible and available’ is made by the CEO, whether the claim was denied due to insufficient funds, the total cost of the referral.”

13. For the avoidance of doubt, The Times confirms that:

- i. The Times is not asking for IHS to provide any personally identifiable information, such as the name and address of the patient-applicant.
- ii. Instead, the Request is limited to the records used by IHS to track applications for PRC. Specifically, the Request seeks the medical services requested by the patient-applicant, the referral hospital, the date of the request for referral, whether the application was accepted or denied, the date of the decision, the reason for each denial, the hospital to which the accepted patient was referred, and the total cost of the referral.

14. On September 17, 2021, Mr. Walker emailed IHS asking for a status update on the Request.

15. On September 20, 2021, IHS notified Mr. Walker that the Request is number 39 in IHS’s queue and reached out to the PRC Program office “to determine what records we might have responsive to your request.”

16. IHS has not communicated with The Times since.

FIRST CAUSE OF ACTION

17. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

18. Defendant is an agency subject to FOIA and must therefore release, in response to a FOIA request, any disclosable records in its possession at the time of the Request and provide a lawful reason for withholding any other materials as to which it is claiming an exemption.

19. Defendant has failed to meet the statutory deadlines of 20 business days set by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

20. Defendant is permitted to withhold records or parts of records only if one of FOIA's enumerated exemptions apply.

21. No exemptions permit the withholding of the records sought by the Request.

22. Accordingly, Plaintiffs are entitled to an order compelling Defendant to produce the records responsive to the Request.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

23. Declare that the records sought by the Request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

24. Order Defendant to undertake an adequate search for the requested records and provide the records to Plaintiffs within 20 business days of the Court's order;

25. Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

26. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, New York
December 7, 2021

/s/ David E. McCraw
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